

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant:	Daniel J. McGurran et al.	Examiner:	Donald Lawrence Tarazano
Serial No.:	09/872,532	Group Art Unit:	1773
Filed:	June 1, 2001	Docket No.:	M120.221.101 / 56763US002
Due Date:	August 25, 2007 w/ extension		
Title:	COLOR STABLE PIGMENTED POLYMERIC FILMS HAVING DYES FOR COLOR ADJUSTMENT		

APPEAL BRIEF UNDER 37 C.F.R. §41.37

Mail Stop Appeal Brief – Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir/Madam:

This Appeal Brief is submitted in support of the Notice of Appeal filed on May 25, 2007, appealing the final rejection of claims 1, 2, 10, 11, 13-19, and 21-27 of the above-identified application as set forth in the Final Office Action mailed February 28, 2007.

The U.S. Patent and Trademark Office is hereby authorized to charge Deposit Account No. 50-0471 in the amount of \$500.00 for filing a Brief in Support of an Appeal (as set forth under 37 C.F.R. §41.20(b)(2)) and \$120.00 to cover a one-month extension-of-time (as set forth under 37 C.F.R. §1.17(a)(1)). At any time during the pendency of this application, please charge any required fees or credit any overpayment to Deposit Account No. 50-0471.

Appellant respectfully requests consideration and reversal of the Examiner's rejection of pending claims 1, 2, 10, 11, 13-19, and 21-27.

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REAL PARTY IN INTEREST

The real party in interest is 3M Company (formerly known as Minnesota Mining and Manufacturing Company) of St. Paul, Minnesota and its affiliate 3M Innovative Properties Company of St. Paul, Minnesota.

RELATED APPEALS AND INTERFERENCES

Appellant is unaware of other prior or pending appeals, interferences or judicial proceedings which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in this Appeal.

STATUS OF CLAIMS

In the Final Office Action mailed February 28, 2007, claims 1, 2, 10, 11, 13-19, and 21-27 were rejected. Claims 1, 2, 10, 11, 13-19, and 21-27 remain pending in the application and are the subject of the present Appeal.

STATUS OF AMENDMENTS

No Amendments have been filed subsequent to the Final Office Action mailed February 28, 2007.

SUMMARY OF THE CLAIMED SUBJECT MATTER

This Summary is set forth as exemplary embodiment of the language corresponding to independent claims 1, 14, 26 and 27. Discussions about features of claims 1, 14, 26 and 27 can be found *at least* at the cited locations in the specification and drawings.

Claim 1 relates to a pigmented optical body comprising at least one layer of a thermoplastic polymer material, wherein dispersed within the polymer material is between 0.01 and 1 percent by weight of a particulate pigment having a mean diameter no more than 500 nm, wherein the optical body exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5% to 90%, wherein the dispersed particulate pigment imparts a substantial

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transmitted color to the optical body, the optical body further comprising at least one dye added in an amount sufficient to adjust the transmitted color of the optical body to a substantially neutral gray. (Page 2, lines 22-27; page 4, lines 18-19; page 5, lines 5-19; page 6, lines 21-31; page 8, lines 7-17; page 9, lines 7-28; page 11, line 23 through page 12, line 9; page 12, line 31 through page 13, line 31; and page 17, line 19 through page 18, line 15; FIGS. 1-4).

Claim 14 relates to a pigmented optical body comprising at least one layer of a thermoplastic polymer material having dispersed therein a particulate pigment in an amount effective to produce a tint perceptible to an observer, wherein the optical body exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less than or equal to 5%, the optical body further comprising at least one dye in an amount effective to adjust the color of the optical body by no more than 15 units of a^* and by no more than 15 units of b^* . (Page 2, lines 22-27; page 4, lines 18-19; page 5, lines 5-19; page 6, lines 21-31; page 8, lines 7-17; page 9, lines 7-28; page 11, line 23 through page 12, line 9; page 12, line 31 through page 13, line 31; and page 17, line 19 through page 18, line 15; FIGS. 1-4).

Claim 26 relates to a window film comprising at least one layer of a cast, oriented, polyester-containing polymer material having a casting thickness of between 0.3 and 3 mm, the at least one layer having dispersed therein between 0.02 and 0.5 percent by weight carbon black particulate pigment having a mean diameter of no more than 500 nm and a blue dye in an amount sufficient to adjust the transmitted color of the window film to a substantially neutral gray, and wherein the window film exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less than or equal to 5%. (Page 2, lines 22-27; page 4, lines 18-19; page 5, lines 5-19; page 6, lines 21-31; page 8, lines 7-17; page 9, lines 7-15; page 11, line 23 through page 12, line 9; page 12, line 31 through page 13, line 31; and page 17, line 19 through page 18, line 15; FIGS. 1-4).

Claim 27 relates to a window film consisting essentially of at least one layer of a cast, oriented, polyester-containing polymer material having a casting thickness of between 0.3 and 3 mm, the at least one layer having dispersed therein between 0.02 and 0.5 percent by weight

carbon black particulate pigment having a mean diameter of no more than 500 nm and a blue dye in an amount sufficient to adjust the transmitted color of the window film to a substantially neutral gray, and wherein the window film exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less than or equal to 5%. (Page 2, lines 22-27; page 4, lines 18-19; page 5, lines 5-19; page 6, lines 21-31; page 8, lines 7-17; page 9, lines 7-15; page 11, line 23 through page 12, line 9; page 12, line 31 through page 13, line 31; and page 17, line 19 through page 18, line 15; FIGS. 1-4).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

I. First Grounds of Rejection

Claims 1, 2, 10, 11, 13-19, and 21-27 stand rejected under 35 U.S.C. §112, second paragraph, as being indefinite.

II. Second Grounds of Rejection

Claims 1, 2, 10, 11, 13-19, and 21-27 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Enniss et al., U.S. Publication No. 2006/0003158 (“Enniss ‘158 Publication”) or Enniss et al., U.S. Patent No. 6,440,551 (“Enniss ‘551 Patent”) alone or in view of Oliver et al., U.S. Patent No. 4,634,637 (“Oliver”) or Marks et al., U.S. Patent No. 3,298,959 (“Marks”).

ARGUMENT

I. Applicable Law

The second paragraph of 35 U.S.C. 112 requires that the claims set forth the subject matter that applicants regard as their invention, and particularly point out and distinctly define the metes and bounds of the subject matter that will be protected by the patent grant. In reviewing a claim for compliance with 35 U.S.C. 112, second paragraph, the Examiner must consider the claim as a whole to determine whether the claim apprises one of ordinary skill in the art of its scope and, therefore, serves the notice function required by 35 U.S.C. 112, second paragraph, by providing clear warning to others as to what constitutes infringement of the patent.

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See, e.g., *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379, 55 USPQ2d 1279, 1283 (Fed. Cir. 2000). See also *In re Larsen*, No. 01-1092 (Fed. Cir. May 9, 2001) (unpublished). See also *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1366, 71 USPQ2d 1081, 1089 (Fed. Cir. 2004) (“The requirement to ‘distinctly’ claim means that the claim must have a meaning discernible to one of ordinary skill in the art when construed according to correct principles.... Only when a claim remains insolubly ambiguous without a discernible meaning after all reasonable attempts at construction must a court declare it indefinite.”). A claim term that is not used or defined in the specification is not indefinite if the meaning of the claim term is discernible. *Bancorp Services, L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1372, 69 USPQ2d 1996, 1999-2000 (Fed. Cir. 2004) (holding that the disputed claim term “surrender value protected investment credits” which was not defined or used in the specification was discernible and hence not indefinite because “the components of the term have well recognized meanings, which allow the reader to infer the meaning of the entire phrase with reasonable confidence”).

Patent Examiners carry the responsibility of making sure that the standard of patentability enunciated by the Supreme Court and by the Congress is applied in each and every case. MPEP §2141. The Examiner bears the burden under 35 U.S.C. §103 in establishing a *prima facie* case of obviousness. *In re Fine*, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). “Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. ___, *slip opinion at page 14* (2007); *In re Khan*, 78 USPQ2d 1329 (Fed. Cir. 2006). In this regard, identification of a teaching, suggestion, or motivation for modifying a reference or combination of the teachings of multiple references provides helpful insight. *KSR*, 550 U.S. at ___, *slip opinion at page 15*. “An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. ___, 2007 WL 1237837, at *12 (2007) (“The combination of familiar elements

according to known methods is likely to be obvious when it does no more than yield predictable results.”).” *Leapfrog Enterprises Inc. v. Fisher-Price Inc.*, 82 USPQ2d 1687, 1690-1691 (Fed. Cir. 2007).

II. First Grounds of Rejection

Claims 1, 2, 10, 11, 13-19, and 21-27 stand rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention. Specifically, regarding the claim language “exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5% to 90%,” the Examiner questions whether this means that over the range of 400 nm – 700 nm the transmission of light is within the range of 5% to 90%.

Each of independent claims 1, 14, 26, and 27 recite that the claimed optical body (claims 1 and 14) or window film (claims 26 and 27) exhibits a transmission of light, within a wavelength band of 400 – 700 nm, of from 5% to 90%. Support for this language is found, for example, at page 5, lines 7-10. In response to the Examiner’s question, the referenced claim language does mean that over the range of 400 nm – 700 nm the transmission of light is within the range of 5% to 90%. Pointedly, the Examiner has not elaborated upon, and it is not clear to Appellant, how the claim language can be interpreted to mean otherwise. Accordingly, Appellant submits the claims apprise one of ordinary skill in the art of their scope and, therefore, satisfy the requirements of 35 U.S.C. 112, second paragraph, by providing clear notice as to what would infringe the claim. As such, it is respectfully submitted that the rejection under 35 U.S.C. §112, second paragraph, has been traversed.

III. Second Grounds of Rejection

Claims 1, 2, 10, 11, 13-19, and 21-27 stand rejected under 35 U.S.C. §103(a) as being unpatentable over the Enniss ‘158 Publication or the Enniss ‘551 Patent, alone or in view of Oliver or Marks.

Independent Claim 1

Aspects of the present application relate to adjusting the color of a pigmented polymeric film with the addition of a dye. For example, claim 1 recites a particulate pigment dispersed within a thermoplastic polymer material; added to this pigmented polymer material is at least one dye that adjusts the transmitted color otherwise imparted by the pigmented polymer material to a substantially neutral gray. Enniss '158 Publication and Enniss '551 Patent (collectively referred to herein as "Enniss") are in direct opposition. Namely, Enniss starts with a dyed film layer, and adds a pigmented adhesive in creating a visually additive effect. *Enniss*, Abstract. That is to say, the present application, as embodied for example by claim 1, adds a dye to a pigmented polymer, whereas Enniss adds a pigment to a dyed film. As a point of reference, Enniss represents the then-conventional belief that a colored film with minimal hue and haze could only be formed as a dyed film. As admitted by Enniss, dyed films are not light-stable. The present application overcomes this problem by providing a viable, pigmented film subsequently adjusted to a desired color via a dye additive.

Given the above diametrically opposed purposes of claim 1 as compared to Enniss, it is respectfully submitted that Enniss does not render claim 1 obvious. In particular, nothing in Enniss teaches or suggests adjusting the transmitted color associated with a pigmented polymer using a dye. Thus, for example, Enniss does not teach or suggest adding a dye in an amount sufficient to adjust the transmitted color associated with a pigmented polymer to a substantially neutral gray. One of skill upon reviewing Enniss would understand only to add a pigment-laden adhesive to a dyed film. This understanding does not teach the elements of claim 1. As such, it is respectfully submitted that claim 1 is allowable over the cited references.

Claims 2, 10, 11, 13, 21, 22, 24, and 25 depend from claim 1 and thus, for at least the above reasons, are also allowable over the cited art.

Dependent Claim 13

In addition, claim 13 recites that the dye adjusts the transmitted color of the optical body by no more than 15 units of a* and by no more than 15 units of b*. In contrast, because Enniss

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starts with a dyed film, the dye associated with this film inherently adjusts a transmitted color by more than 15 units a^* and/or more than 15 units of b^* . For example, Example 1 of Enniss describes applying a pigmented coating to a dyed film. The pigmented coating had an a^* value of 0.84 and a b^* value of 9.25. The resultant, coated film exhibited an a^* value of -3.96 and a b^* value of -4.9. Inherently, then, the initial, dyed film exhibited a b^* value of 15.15. This, in turn, means that the dye “adjusted” the color of the base film by 15.15 units of b^* . Thus, it is respectfully submitted that claim 13 further defines over the cited references.

Dependent Claim 24

With respect to dependent claim 24, it is respectfully submitted that Enniss teaches away from the use of a carbon black pigment, such that a requisite suggestion to combine Enniss with Oliver or Marks does not exist. In particular, Enniss discloses altering a gray-toned, dyed film using a separate pigment selected to satisfy the color deficiency in the dyed film layer. *Enniss* ‘551 *Patent*, col. 1, l. 33 – col. 2, l. 9. With this specific guidance in mind, a carbon black pigment would not address the “color deficiency” of a gray-toned dyed film. As a result, because the proposed modification would render Enniss unsatisfactory for its intended purpose, Enniss teaches away from the limitations of claim 24 such that *prima facie* obviousness has not been established.

Independent Claim 14

Independent claim 14 recites a pigmented optical body including a pigmented polymer material to which a dye is added to adjust the color by no more than 15 units of a^* and by no more than 15 units of b^* . Enniss does not teach or suggest at least these limitations. In particular, and as described above, Enniss starts with a dyed film, not a pigmented polymer. Thus, nothing in Enniss teaches or suggests adding a dye to a pigmented polymer in an amount effective to adjust the color of the resultant optical body by no more than 15 units of a^* and no more than 15 units of b^* . Along these same lines, because Enniss is essentially limited to adding a pigmented adhesive onto a dyed film, nothing in Enniss teaches or suggests a polymer material

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having dispersed therein a particulate pigment in an amount effective to produce a tint as otherwise recited in claim 14. The dyed base film of Enniss (prior to application of the pigmented adhesive) is gray-toned or tinted; thus, the added pigmented does not produce a tint, rather the dye provides this effect. For at least these reasons, then, it is respectfully submitted that claim 14 is allowable over the cited art.

Claims 15-19, 21, and 23 depend from claim 14, and thus are also allowable for at least the above reasons.

Dependent Claim 16

In addition, it is noted that claim 16 recites that the optical body has an a^* value and a b^* value in the range of -1.5 ± 1 . It is respectfully submitted that nothing in Enniss teaches or suggests this limitation. In fact, the only disclosures in Enniss to a^* and b^* values is in Example 1, whereby the resultant coated film exhibited an a^* value of -3.96 and a b^* value of -4.9, both of which are outside of the claimed range. Thus, it is respectfully submitted that claim 16 recites additionally allowable subject matter.

Independent Claims 26 and 27

Independent claims 26 and 27 are also allowable over the cited art for at least the reasons provided above with respect to claims 1 and 14. In addition, claims 26 and 27 recite a carbon black particulate pigment. As described above, Enniss teaches away from the use of a carbon black pigment, such that claims 26 and 27 are further distinguished over the cited art. Along these same lines, claims 26 and 27 recite that the carbon black particulate pigment is dispersed within the polymer material at between 0.02 and 0.5 percent by weight. Nothing in Enniss teaches or suggests this limitation. In fact, Examples 1 and 2 of Enniss describe use of a pigment at 1 weight percent. Further, Enniss does not teach an oriented polymer having carbon black particulate pigment dispersed therein. For at least these reasons, then, it is respectfully submitted that claims 26 and 27 recite allowable subject matter over the cited references.

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CONCLUSION

Appellant submits that the Examiner has presented the best available references against the claimed subject matter of the pending application. Reversal of the rejections of claims 1, 2, 10, 11, 13-19, and 21-27 is respectfully requested.

Any inquiry regarding this Appeal Brief to the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office should be directed to David Patchett at Telephone No. (651) 736-4713, Facsimile No. (651) 736-6133 or Timothy A. Czaja at Telephone No. (612) 573-2004, Facsimile No. (612) 573-2005. In addition, all correspondence should continue to be directed to the following address:

3M Innovative Properties Company
Office of Intellectual Property Counsel
P.O. Box 33427
St. Paul, MN 55133-3427

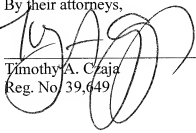
Respectfully submitted,

Daniel J. McGurran et al.,

By their attorneys,

Dated: AUGUST 27, 2007

TAC:kmh:jms



Timothy A. Czaja
Reg. No. 39,649

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CLAIMS APPENDIX

1. A pigmented optical body comprising at least one layer of a thermoplastic polymer material, wherein dispersed within the polymer material is between 0.01 and 1 percent by weight of a particulate pigment having a mean diameter no more than 500 nm, wherein the optical body exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5% to 90%, wherein the dispersed particulate pigment imparts a substantial transmitted color to the optical body, the optical body further comprising at least one dye added in an amount sufficient to adjust the transmitted color of the optical body to a substantially neutral gray.
2. The body of claim 1, wherein the optical body has an a* value and a b* value in the range of +/- 5.
3. – 9.(Cancelled)
10. The body of claim 1, wherein the body exhibits an internal haze of no more than 5%.
11. The body of claim 1, wherein the at least one dye is disposed in the at least one layer of thermoplastic polymer material.
- 12.(Cancelled)
13. The body of claim 1, wherein the at least one dye adjusts the transmitted color of the optical body by no more than 15 units of a* and by no more than 15 units of b*.
14. A pigmented optical body comprising at least one layer of a thermoplastic polymer material having dispersed therein a particulate pigment in an amount effective to produce a tint perceptible to an observer, wherein the optical body exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less

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than or equal to 5%, the optical body further comprising at least one dye in an amount effective to adjust the color of the optical body by no more than 15 units of a^* and by no more than 15 units of b^* .

15. The body of claim 14, wherein the body has a substantially neutral gray color.

16. The body of claim 15, wherein the body has an a^* value and a b^* value in the range of -1.5 ± 1 .

17. The body of claim 14, wherein the at least one layer is a single layer and the optical body consists essentially of the single layer.

18. The body of claim 14, wherein the particulate pigment has a mean diameter of no more than 500 nm.

19. The body of claim 14, wherein the at least one dye is disposed in the at least one layer of thermoplastic polymer material.

20.(Cancelled)

21. The body of either claim 1 or claim 14, wherein the body further comprises a rigid window member to which the at least one layer is laminated.

22. The body of claim 1, wherein the at least one dye is co-polymerized in the polymer material.

23. The body of claim 14, wherein the at least one dye is co-polymerized in the polymer material.

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24. The body of claim 1, wherein the particulate pigment comprises carbon black.
25. The body of claim 24, wherein the at least one dye comprises a blue dye.
26. A window film comprising at least one layer of a cast, oriented, polyester-containing polymer material having a casting thickness of between 0.3 and 3 mm, the at least one layer having dispersed therein between 0.02 and 0.5 percent by weight carbon black particulate pigment having a mean diameter of no more than 500 nm and a blue dye in an amount sufficient to adjust the transmitted color of the window film to a substantially neutral gray, and wherein the window film exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less than or equal to 5%.
27. A window film consisting essentially of at least one layer of a cast, oriented, polyester-containing polymer material having a casting thickness of between 0.3 and 3 mm, the at least one layer having dispersed therein between 0.02 and 0.5 percent by weight carbon black particulate pigment having a mean diameter of no more than 500 nm and a blue dye in an amount sufficient to adjust the transmitted color of the window film to a substantially neutral gray, and wherein the window film exhibits a transmission of light, within a wavelength band of 400 nm – 700 nm, of from 5 to 90% and exhibits an internal haze of less than or equal to 5%.

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EVIDENCE APPENDIX

All the evidence related to this Appeal is on the record and before the Board. Therefore, no additional evidence is identified in this Appendix.

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RELATED PROCEEDINGS APPENDIX

There are no additional related proceedings to be considered in this Appeal. Therefore, no such proceedings are identified in this Appendix.